FILE COPY

FILED
MAR 8 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-586

ELMER O. CADY, WARDEN,

Petitioner,

v.

CHESTER J. DOMBROWSKI,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

WILLIAM J. MULLIGAN
108 West Wells Street
Milwaukee, Wisconsin 53203

DAVID E. LEICHTFUSS
324 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Attorneys for Respondent

Washington, D.C. • THIEL PRESS • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
QUESTIONS PRESENTED	6
STATEMENT OF CASE	6
SUMMARY OF ARGUMENT	12
ARGUMENT:	
I. The Second Warrantless Search by an Officer of the Ford Thunderbird at the Kewaskum Garage, Two and One Quarter Hours After Dombrowski's Arrest for Drunk Driving, and While Dombrowski Was Hospitalized Under Police Guard in a Different City, Was Not Reasonable Nor Justifiable Under the Exigencies of the Situation and Violated the Fourth Amendment to the United States Constitution	15
A. The Court of Appeals Was Not Bound by the District Court Findings	15
B. Fourth Amendment Principles Apply	19
C. Officer Weiss' Conduct Constituted a Search of the Thunderbird	20
D. Fourth Amendment Requires Adherence to Judicial Processes	21
E. Exceptions to Judicial Process	22
F. Recognized Exigent Circumstances Contrasted to Officer Weiss' Conduct	22
1. Officer Weiss' Conduct Cannot Be Justified as a Search Incident to Arrest	23

2. Officer Weiss' Conduct Cannot Be Justified as a Search of a Vehicle in Police Custody 27

3. Officer Weiss' Warrantless Search of the Thunderbird Cannot Be Justified as a Reasonable Act to Secure Dombrowski's "Gun" 30

II. The Discovery of a White Sock and Floormat by a State Crime Laboratory Representative in a Third Search of the Dodge Occurring Subsequent to the Execution of the Search Warrant for the Dodge Was Not Inadvertent and Not Reasonable Within the Plain View Doctrine 33

III. This Court Should Not Modify Wisconsin's Exclusionary Rule Adopted Prior to the *Mapp* Decision 36

A. Issue Should Not Be Considered 36

B. Wisconsin Exclusionary Rule 37

C. Exclusionary Rule Should Not Be Modified at This Time 39

CONCLUSION 44

TABLE OF AUTHORITIES

Cases:

Aguilar v. Texas, 378 U.S. 108 (1964) 34

Alderman v. United States, 394 U.S. 165 (1969) 34

Barrentine v. United States, 434 F.2d 636 (9th Cir. 1970) 24, 25

Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630 (1967) 16

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 14, 15, 37, 40, 42, 43

Boulden v. Hulman, 394 U.S. 478 (1969) 16
Browne v. State, 24 Wis. 2d 491, 129 N.W.2d 175, 131 N.W.2d 169 (1964) 37
Cabbler v. Virginia, 212 Va. 520, 184 S.E.2d 781 (1971) 32
Carroll v. United States, 267 U.S. 132 (1925) 13, 22, 24
Chambers v. Maroney, 399 U.S. 42 (1970) 21, 22, 25
Chimel v. California, 395 U.S. 752 (1969) 13, 21, 22
Coolidge v. New Hampshire, 403 U.S. 443 (1971) . 13, 14, 19, 36
Cooper v. California, 386 U.S. 58 (1967) 13, 22, 27, 29
Davis v. Mississippi, 394 U.S. 721 (1969) 22, 26
District of Colubmia v. Little, 178 F.2d 13 (D.C. Cir. 1950) 16
Dombrowski v. Cady, 319 F. Supp. 530 (E.D. Wis. 1970) 1, 7, 18
Dombrowski v. Cady, 11 Cr. L. 2289 (7th Cir. 1972) 1
Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968) 22, 25
Elkins v. United States, 364 U.S. 206 (1960) 39
Harris v. Nelson, 394 U.S. 286 (1969) 16
Harris v. United States, 390 U.S. 234 (1968) . 13, 18, 22, 28, 29
Hoffa v. United States, 385 U.S. 293 (1966) 38
Holiday v. Johnson, 313 U.S. 342 (1941) 16
Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923). . 13, 14, 19, 37
Irvine v. California, 347 U.S. 128 (1954) 41
Jokosh v. State, 181 Wis. 160, 193 N.W. 976 (1923) 38
Katz v. United States, 389 U.S. 347 (1967) 13, 21, 23
Ker v. California, 374 U.S. 23 (1963) 14, 38, 39
Kluck v. State, 37 Wis. 2d 378, 155 N.W.2d 26 (1967) .... *passim*
Mapp v. Ohio, 367 U.S. 643 (1961) ..... *passim*

Mayfield v. United States, 9 Cr. L. 2115 (D.C. Cir. 1971) 33
Mularkey v. State, 201 Wis. 429, 230 N.W. 76 (1930) 32
Napue v. Illinois, 360 U.S. 264 (1959) 12, 16
Neil v. Biggers, ___ U.S. ___, 93 S.Ct. 375 (1972) 12, 16
Preston v. United States, 376 U.S. 364 (1964) 13, 15, 23, 24, 25
Stanford v. State of Texas, 379 U.S. 476 (1965) 12, 20
Stanford v. State of Texas, 379 U.S. 376 (1965) 34
State v. Dombrowski, 44 Wis. 2d 486, 171 N.W.2d 349 (1969) 1, 7, 18
State v. Kroening, 274 Wis. 266, 79 N.W.2d 810 (1954) 13, 14, 19, 38
Stoner v. California, 376 U.S. 483 (1946) 24
Terry v. Ohio, 392 U.S. 1 (1968) 17, 20, 21, 26
Tyler v. Beto, 391 F.2d 993 (5th Cir. 1968) 16
United States v. Harvey, 397 F.2d 526 (7th Cir. 1968)..... 26
United States v. Jeffers, 342 U.S. 48 (1951) 21, 24, 27
United States v. Joyner, 8 Cr. L. 2411 (E.D. Pa. 1971)..... 25
United States v. Mossbauer, 9 Cr. L. 2276 (U.S. Ct. Mil. App. 1971) 33
Waddy v. Heer, 383 F.2d 789 (5th Cir. 1967) 16
Warden v. Hayden, 387 U.S. 294 (1967) 38
Weeks v. United States, 232 U.S. 383 (1914) 42
Wong Sun v. United States, 371 U.S. 471 (1963) 34

United States Constitution:

Fourth Amendment ..... *passim*
Fourteenth Amendment ..... *passim*

Statutes and Rules:

28 U.S.C. §2243 ..... 3, 16

28 U.S.C. §2254(d) & (e) 3, 16

Rule 36(3), Supreme Court of the United States 10

Rule 52(a), Federal Rules of Civil Procedure 2, 16

Rule 81(a)(2), Federal Rules of Civil Procedure 3, 16

Wisconsin Statutes:

139.40 28
151.18 28
161.29 28
161.45 28
939.22(22) 32
941.23 32
945.05(3) 28
964.245 32

Other Authorities:

American Bar Association, Section on Criminal Law, Report to House of Delegates, 107c [concerning the Exclusionary Rule and and Senate Bill No. 2657 (92d Congress, 1st Session, as amended)] 15, 40, 41, 42

Majority Report 15, 40, 41
Minority Report 42

American Law Institute, Model Code of Pre-Arraignment Procedure, Proposed Official Draft No. 1, April 10, 1972 ..... 41, 42

79 C.J.S. Searches & Seizures, §25 p. 795 20

79 C.J.S. Searches & Seizures, §83, p. 897 ..... 14, 36

Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.Ch.L.Rev. 665 (1970) 14, 40

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-586

ELMER O. CADY, WARDEN,

Petitioner,

v.

CHESTER J. DOMBROWSKI,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Dombrowski v. Cady* (7th Cir. 1972), 11 Cr. L. 2289, and is printed in the appendix to the petition. The opinion of the District Court is reported as *Dombrowski v. Cady* (E.D. Wis. 1970), 319 F. Supp. 530 (A. 22). The opinion of the Supreme Court of Wisconsin is reported as *State v. Dombrowski* (1969), 44 Wis. 2d 486, 171 N.W.2d 349.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment Four:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment Fourteen:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 52(a) of the Federal Rules of Civil Procedure:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purpose of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a

master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 81(a)(2) of the Federal Rules of Civil Procedure:

Rule 81 – Applicability In General
(a) To What Proceedings Applicable.

* * * * *

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that practice in such proceedings is not set forth in Statutes of the United States and has heretofore conformed to the practice in civil actions.

* * * * *

(as amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968) 28 U.S.C. App. (1964), as amended, (Supp. V, 1965-1969).

28 U.S.C. §2243:

§2243 Issuance of writ; return; hearing; decision

* * * * *

The Court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

June 25, 1948, c. 646, 62 Stat. 965.

28 U.S.C. §2254(d) & (e):

§2254 State custody; remedies in Federal courts

* * * * *

(d) In any proceeding instituted in a federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction in a proceeding to which the applicant for the writ and the state or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the Respondent shall admit–

(1) that the merits of the factual dispute were not resolved in the state court hearing;

(2) that the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the state court hearing;

(4) that the state court lacked jurisdiction of the subject matter or over the person of the applicant in the state court proceeding;

(5) that the applicant was an indigent and the state court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the state court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; or

(7) that the applicant was otherwise denied due process of law in the state court proceeding;

(8) or unless that part of the record of the state court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such

factual determination, is produced as provided for hereinafter, and the federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing on the proceeding in the federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the state court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such state court proceeding to support the state court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the state shall produce such part of the record and the federal court shall direct the state to do so by order directed to an appropriate state official. If the state cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the state court's factual determination.

* * * * *

June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, §2, 80 Stat. 1105.

QUESTIONS PRESENTED

1. Whether the second warrantless search by an officer of the Ford Thunderbird at the Kewaskum garage, two and one quarter hours after Dombrowski's arrest for drunk driving, and while Dombrowski was hospitalized under police guard in a different city, was reasonable and justifiable under the exigencies of the situation and within the proscriptions of the Fourth and Fourteenth Amendments of the United States Constitution.

2. Whether the discovery of a sock and floormat by a state crime laboratory representative in a third search of the Dodge, occurring subsequent to the execution of a search warrant authorizing a search of such vehicle, was inadvertent and therefore reasonable within the plain view doctrine.

3. Whether this Court should in effect modify Wisconsin's Exclusionary Rule adopted prior to the *Mapp* decision.[1]

STATEMENT OF THE CASE

Chester J. Dombrowski petitioned the District Court in forma pauperis for writ of habeas corpus alleging that he was being illegally detained by the Warden of the Wisconsin State Prison by virtue of a conviction and

[1] Respondent has merely restated Petitioner's Question No. 4. Since this issue was not briefed to nor considered by the Court of Appeals, nor raised by Petitioner in the District Court, Supreme Court of Wisconsin, or County Court of Fond du Lac County, Wisconsin, Respondent does not agree to the appropriateness of this issue for resolution by this Court. See *infra* pp. 36-37.

sentence obtained contrary to his federal constitutional rights. (A. 5,7). Dombrowski was convicted of first degree murder on July 18, 1968, after a trial by jury in County Court Branch II, Fond du Lac, Wisconsin. (A. 7,8). He was sentenced to life imprisonment, which sentence he is presently serving. (A. 7). A divided Wisconsin Supreme Court affirmed the conviction in *State v. Dombrowski*, 44 Wis.2d 486, 171 N.W.2d 349 (1969). The District Court, the Honorable Myron L. Gordon, presiding, entered a decision and order denying the petition. (A. 6). It is reported as *Dombrowski v. Cady*, 319 F.Supp. 530. (E.D. Wis. 1970). Dombrowski filed a Notice of Appeal from such order and the District Court issued a certificate of probable cause. (A. 6). On June 2, 1972, the United States Court of Appeals for the Seventh Circuit reversed and remanded with direction to grant the relief prayed for in the petition unless the Wisconsin authorities grant Dombrowski a new trial within a reasonable period to be set by the District Court. A petition for rehearing and suggestion for hearing en banc were denied on July 24, 1972. On August 15, 1972, the District Court entered an order providing that the state was to notify the Court within 20 days of its decision on whether to retry Dombrowski and providing that any such retrial was to be held within 90 days. On September 1, 1972, a counsel for Petitioner in response to said order advised the Court that the Fond du Lac County District Attorney intends to retry Dombrowski if this Court does not reverse the Court of Appeals decision and order. (R. Letter, 9/1/72 to Hon. Myron L. Gordon from Mary V. Bowman, an attorney for Cady). Further proceedings have been stayed pending action by this Court.

By stipulation and order the record before the District Court consisted of the entire state court record, including pleadings, transcripts and briefs filed in the Wisconsin Supreme Court and the records relating to a pretrial request to the Wisconsin Supreme Court for a writ of prohibition. (A. 5). These documents were designated as Exhibits A through E. (A. 5).

On September 11, 1967, Chester J. Dombrowski was involved in a one car automobile accident north of Kewaskum, Wisconsin, while driving a Thunderbird at about 10:30 p.m. (A. 106-107, 109). The vehicle was damaged and rendered inoperative. Dombrowski, a police officer, summoned the sheriff's office to the scene. (A. 108-109). Dombrowski met with Officers Boudry and Weiss at the Glacier Inn in Kewaskum. (A. 107-108). Dombrowski told the officers his occupation and advised them that there were no others involved in the accident and that he was alone. (A. 109). At the accident scene, Dombrowski gave the officers three different accounts of how the accident had occurred. (A. 109). He furnished his license and identification. (A. 81).

The officers investigated the accident and called a wrecker for Dombrowski's damaged vehicle. (A. 81, 89, 107). Just prior to the vehicle's removal from the scene, Officer Boudry searched through the inside of the car, including under the seat, in the glove compartment and the back seat. (A. 110). The officer was searching because Dombrowski said he was a police officer but he had no gun on him. (A. 110). No weapon was found during the search nor was any item seized. The officer locked the car doors. (A. 110). The car was removed to a private garage, (Honeck's) in Kewaskum. (A. 90).

The officers and Dombrowski left the accident scene at 11:33 p.m. (A. 104). Dombrowski was taken to the

sheriff's office at West Bend, Wisconsin. (A. 81). At the sheriff's office, Dombrowski conferred with Assistant District Attorney Aldwin Seefeldt. (A. 81-82). Dombrowski was arrested for drunk driving at approximately 11:58 p.m. on September 11, 1967. (A. 82, 89). After his arrest, Dombrowski was taken by the officers to the West Bend Police Department where Dombrowski refused to take a breathalyzer or "chem" test. (A. 82-83). Dombrowski was then taken to a hospital in West Bend for treatment of some injuries he received in the accident and remained in the hospital under guard. (A. 83-86).

While Dombrowski was at the West Bend police station Officer Weiss observed him to be incoherent at times. (A. 83). At the hospital at 2:00 a.m. Dombrowski was uncommunicative. (A. 105). Thereafter, the officers called Dombrowski's wife to find out about his health. (A. 85, 106).

Some two and one quarter hours after Dombrowski's arrest for drunk driving and while Dombrowski remained in the hospital under guard, Officer Weiss traveled from the hospital at West Bend to Honeck's Garage in Kewaskum and searched the entire Dombrowski car again. (A. 86, 89, 93-95, 104). The search was conducted without a search warrant and without Dombrowski's consent. (A. 89).

During this search, the officer seized numerous items from the locked trunk of the vehicle and removed them to the sheriff's office in West Bend. (A. 94-96, 97-102). The items were seized as they appeared to have blood on them. (A. 96). These items were subsequently introduced into evidence against Dombrowski at his trial. (A. 97-102).

Because of his arrest for drunk driving and his being retained in custody without bail, Dombrowski retained the services of an attorney, Clyde Schloemer, of West Bend. By virtue of such retention and in his professional capacity, Mr. Schloemer had visited and conferred with Dombrowski on the afternoon of September 12, 1967. (R. Ex. E, Br. in Support of Writ of Prohibition, p. 3). Schloemer then communicated with Robert Kauffman, District Attorney for Washington County, who was waiting in the hospital corridor and related to him information obtained in his conversation with Dombrowski. (R. Ex. C. p. 122-124).

Following this conversation, law enforcement officials conducted an extensive search of Dombrowski's brother's farm, Dombrowski's 1960 Dodge and the home located on the farm. (A. 167-177).[2] During this search, the body of Mr. McKinney was found. (A. 175-176).

That evening application was made for a search warrant to search Dombrowski's 1960 Dodge and the Thunderbird.[3] (A. 40-45). That evening right after obtaining the

[2]This testimony was printed in the appendix with a notation that it was considered by petitioner to be unnecessary under Rule 36(3) but printed at the request of the respondent although the portions of testimony were considered by petitioner not to be a part of the record on file with the District Court and not a part of the record filed with this Court. (A. 167). Although not initially filed with this Court, transcripts of this testimony were subsequently located and certified by the Clerk of the District Court as part of the record in this matter.

[3]A third search of the Thunderbird was conducted on September 12, 1967, in West Bend pursuant to the search warrant issued by the County Court of Fond du Lac County, Wisconsin on September 12, 1967. (A. 35, 173). A rental agreement was found in the Thunderbird as a result of this search, but the evidence obtained from this search was suppressed by the County Court of Fond du Lac County because it was issued beyond the territorial jurisdiction of the Court. (A. 36, 62-63).

search warrant Undersheriff Howard searched the Dodge and had it removed from the farm by a wrecker. (A. 172-173). On the next day, September 13, 1967, Undersheriff Howard prepared his return to the search warrant listing the items that he found in the search of the 1960 Dodge. (A. 172-173). The return listed not only items discovered in the search of the Dodge, but other items that were found outside of the car on the premises. (A. 33, 173). Subsequently, on September 13, 1967, the day after execution of the search warrant for the 1960 Dodge, a representative of the State Crime Laboratory conducted a third search of the 1960 Dodge, while it was located at the Fond du Lac County Sheriff's Garage. (A. 153-154, 158). The State Crime Laboratory representative did not make any recoveries from the car while it was located in the farm area. (A. 155). No further warrant for the search of the car had been obtained, but the State Crime Laboratory representative stated that he was acting in the capacity of the Sheriff's Department of Fond du Lac County. (A. 155-156). The items that were recovered by the State Crime Laboratory representative were not listed and attached to the search warrant as a return. (A. 156). The items seized in this third search of the 1960 Dodge were also introduced in evidence at Dombrownski's trial. (A. 153-154).

Mr. Dombrowski was charged with first degree murder of Mr. McKinney. (A. 7). Following denial of pretrial motions to supress evidence, Mr. Dombrowski was tried before a jury which returned a guilty verdict. (A. 7,55).

Throughout the Petitioner's brief in this matter, it is critically asserted, directly or by inference, that the United States Court of Appeals for the Seventh Circuit reversed the District Court without having the benefit of the state court record, Ex. A,B,C,D, and E. (Petitioner's Br. pp. 9, 10, 11, 16, 17, 20). This is absolutely not true.

On July 21, 1971, the Clerk of the District Court sent to the Clerk of the Court of Appeals by certified mail the state court record, which had been forwarded on February 1, 1971. (R. Letter dated 7/21/71 to Carrick from LaFave with certified mail receipt 573365 attached). The records of the Clerk of the Court of Appeals indicates that these documents were received and filed. An examination of the state court record itself, Ex. A, B, C, D, and E, which are on file with this Court indicate that they bear the filing stamp of the Clerk of the Court of Appeals dated July 28, 1971. See, for example, page 1 of the trial transcript. (R. Ex. C. p. 1).

SUMMARY OF ARGUMENT

The Court of Appeals was not bound by the District Court findings and could make an independent examination of the record when constitutional issues require the resolution of factual matters. *Napue v. Illinois*, 360 U.S. 264, 271-272 (1959). This is particularly true when the dispute between the parties is not so much over elemental facts as over the constitutional significance to be attached to them especially in habeas corpus action in which the state court record is equally available to both courts. *Neil v. Biggers*, ____ U.S. ____, 93 S. Ct. 375, 379n. 3 (1972).

Officer Weiss' conduct constituted a search of the Thunderbird. It was conceded by Petitioner in the Court of Appeals to be a search and not an inspection. In any event the constitutionality of the action is not dependent upon the labels that the state applies to the act. *Sibron v. State of New York*, 392 U.S. 40, 61 (1968).

Whether a search and seizure are valid is a question of federal constitutional law. *Kluck v. State*, 37 Wis.2d 378,

386, 155 N.W.2d 26, 29 (1967). Evidence obtained by an illegal search and seizure is inadmissible in Wisconsin criminal trials. *Hoyer v. State*, 180 Wis. 407, 417, 193 N.W. 89, 93 (1923); *State v. Kroening*, 274 Wis. 266, 272-276, 79 N.W.2d 810, 814-816 (1954); *Mapp v. Ohio*, 367 U.S. 643 (1961).

Fourth Amendment principles apply to automobile searches. *Coolidge v. New Hampshire*, 403 U.S. 443, 461-462 (1971). The Fourth Amendment requires adherence to judicial processes. *Chimel v. California*, 395 U.S. 752, 763 (1969). The burden is on those seeking an exemption from the search warrant requirement to show the need for it. *Ibid* at p. 762. Searches conducted outside the judicial process are, *per se*, unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967).

Officer Weiss' conduct at 2:13 a.m. (2-1/4 hours after Dombrowski's arrest) in traveling from a hospital in West Bend (where Dombrowski, a Chicago police officer, was under arrest, guarded and being treated) and making a second warrantless search of Dombrowski's Thunderbird (which had been rendered inoperative in an accident, previously searched, locked and towed to a private garage in Kewaskum) without Dombrowski's consent and without even asking Dombrowski whether he had his service revolver with him (the alleged object of the search) was unreasonable and violative of Dombrowski's right of privacy. *Carroll v. United States*, 267 U.S. 132, 153, 156 (1925); *Preston v. United States*, 376 U.S. 364 (1964). The Thunderbird had not been seized by police for forfeiture under state law and was not in police custody. Cf. *Cooper v. California*, 386 U.S. 58 (1967); Cf. *Harris v. United States*, 390 U.S. 234 (1968).

The discovery of a white sock and floormat by a State Crime Laboratory representative in a third search of Dombrowski's Dodge occurring a day subsequent to the execution of a search warrant for the Dodge, after the Dodge was towed away and the return of the warrant prepared (which did not include these items) was not inadvertent and not reasonable within the plain view doctrine. *Coolidge v. New Hampshire*, 403 U.S. 443, 467-468 (1971). Once the search warrant for the Dodge had been executed and the return prepared it was *functus officio*. 79 C.J.S. Searches and Seizures, §83, p. 897.

A modification of the exclusionary rule was not considered by the courts below. It should not be considered by this Court, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397-398 (1971). In asking this Court to modify the exclusionary rule enunciated in *Mapp v. Ohio*, 367 U.S. 643 (1961), Petitioner is in reality asking the Court to modify Wisconsin's own exclusionary rule which was adopted by the Wisconsin Supreme Court prior to the *Mapp* decision. *Hoyer v. State*, 180 Wis. 407, 417, 193 N.W. 89, 93 (1923); *State v. Kroening*, 274 Wis. 266, 272-276, 79 N.W.2d 810, 814-816 (1954). In our dual state-federal system the states are permitted to adopt workable rules to meet the demands of effective criminal justice in the state provided they meet the requirements of due process. *Ker v. California*, 374 U.S. 23, 34 (1963). The purpose of Wisconsin's exclusionary rule is the protection of privacy. *Kluck v. State*, 37 Wis.2d 378, 386, 155 N.W.2d 26, 29 (1967).

The exclusionary rule should not be modified at this time. Empirical data concerning the effectiveness of the rule is not conclusive. Oaks, *Studying the Exclusionary Rule on Search and Seizure*, 37 U. Ch. L. Rev. 665

(1970); Majority Report to House of Delegates, American Bar Association, Section on Criminal Law, Concerning the Exclusionary Rule and Senate Bill No. 2567 (92d Congress, 1st Session, as amended), adopted by House of Delegates on February 12, 1973, p. 9. Assuming *arguendo*, that the rule should be modified, modification should be done prospectively by legislative action and provide a meaningful alternative. Law enforcement officials should not be given the impression that all constitutional restraints on police have been removed. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 420-422 (1971) [Chief Justice Burger dissenting].

ARGUMENT

I.

THE SECOND WARRANTLESS SEARCH BY AN OFFICER OF THE FORD THUNDERBIRD AT THE KEWASKUM GARAGE, TWO AND ONE QUARTER HOURS AFTER DOMBROWSKI'S ARREST FOR DRUNK DRIVING, AND WHILE DOMBROWSKI WAS HOSPITALIZED UNDER POLICE GUARD IN A DIFFERENT CITY, WAS NOT REASONABLE NOR JUSTIFIABLE UNDER THE EXIGENCIES OF THE SITUATION AND VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. The Court of Appeals was not bound by the District Court's findings

The Court of Appeals was not bound by the District Court's findings "that the examination of the car at the garage was not a search in the *Preston* sense, but rather it was an inspection designed to locate an article of value, to be protected by those responsible for its custody".

(A. 26). An appellate court will not hesitate to undertake independent examination of factual issues when constitutional claims may depend on their resolution. *Napue v. Illinois*, 360 U.S. 264, 271-272 (1959); *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 636 (1967). This is particularly true where the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them. Moreover, this is a habeas corpus case in which the facts are contained primarily in the state court record, equally available to the District Court and the Court of Appeals, *Neil v. Biggers*, ____ U.S. ____, 93 S. Ct. 375, 379n. 3 (1972), Cf. *Boulden v. Hulman*, 394 U.S. 478 (1969).[4]

An independent review by the Court of Appeals of the state court record was particularly appropriate in this case since the Petitioner (then Respondent) conceded that Officer Weiss' conduct was a search.

> "The Petitioner on this appeal cites authorities suggesting that it is semantic petifoggery to say that an invasion of an individual's personal security, for purposes of a 'quest' of any kind is not a 'search'. See *District of Columbia v. Little* (D.C. Cir. 1950) cited at p. 14, Brief of Appellant. This writer finds

---

[4] As to the applicability of Rule 52(a) F.R. Civ. P. see Rule 81(a)(2), F.R. Civ. P. 28 U.S.C. App. (1964), as amended, (Supp. V, 1965-1969); 28 U.S.C. §2243; 28 U.S.C. §2254(d) & (e); Cf. *Holiday v. Johnson*, 313 U.S. 342, 350-353 (1941); Cf. *Harris v. Nelson* 394 U.S. 286, 292-298 (1969). Some cases have concluded that Rule 52(a), F.R. Civ. P. is applicable to habeas corpus proceedings. See, for example, *Waddy v. Heer*, 383 F.2d 789, 793 (5th Cir. 1967); *Tyler v. Beto*, 391 F.2d 993, 995-996 (5th Cir. 1968). [Both involved factual hearings in the District Courts.]

this particular semantic distinction equally unpalatable, and submits that the proper analysis is epitomized in *Terry v. Ohio*, 392 U.S. 1, *supra*. In that case, the United States Supreme Court demolished as 'nothing less than sheer torture of the English language' the myth that a 'frisk' was not a 'search'. 392 U.S. at 16.***" (Footnote omitted. Respondent's Br.–U.S.C. of A. p. 10)

"Officer Weiss was not required by any regulation or statute to inspect or inventory the contents of petitioner's car. The record shows that the object of his *search* was the service revolver which he believed the petitioner carried with him at all times. (Ex. C, pp. 315, 365). Was this *search* reasonable under all the facts?" (Emphasis added. Respondent's Br. U.S.C. of A. p. 11)

The position taken by Petitioner (then respondent) in the U.S. Court of Appeals was in marked contrast to that taken by the state in the Wisconsin Supreme Court:

"Officer *Weiss did not 'search'* the Thunderbird because he did not act with a 'view to' or intent to discover evidence of any crime. He was acting solely to protect the property of the defendant. . .

"The trial court admitted the evidence, which was seized from the Thunderbird, on the basis that it was seized as a result of a reasonable 'custody' search (R. 91, 207-211). If there was a 'search' at all, it was clearly a reasonable custody search. It is submitted, however, that there actually was no 'search', in the constitutional sense, because the action of Officer Weiss was not undertaken 'with a view to discovery of contraband or evidence of guilt to be used in prosecution of a criminal action'." (Footnote omitted. Emphasis added. R. Ex. B. State's Br. in Wis. Sup. Ct. pp. 22-23)

This position is an abandonment of the basis of the holding of the majority in the Wisconsin Supreme Court:

> "The majority of the court is convinced that the *inspection* was done within a reasonable time of the car's transfer to the Kewaskum garage, and was accomplished while the police were responsible for its protection and were in the process of protecting Dombrowski's property and *were not, at that time, engaged in a search of the car looking for incriminating evidence.*" (Emphasis added. *State v. Dombrowski*, 44 Wis.2d 486, 496 (1969).)

It represents a complete change from the position taken by Petitioner (then respondent) in the District Court:

> "*** In this case, as in *Harris*, the *evidence was not discovered pursuant to a 'search'*, and was therefore not within the Fourth Amendment prohibition." (Respondent's Br., U.S. Dist. Ct. p. 7)

> "In the case of Dombrowski's Thunderbird, *there was no 'search'*." (Respondent's Br., U.S. Dist. Ct. p. 9)

It is also totally inconsistent with the decision and order of the District Court in this action:

> "*** Although the line is a narrow one, I conclude that the *examination of the car* at the garage *was not a search* in the *Preston* sense, but *rather it was an inspection* designed to locate an article of value, to be protected by those responsible for its custody. This was *not a search for incriminating evidence* and is constitutionally permissible under *Harris*." (Emphasis added. 319 F. Supp. at p. 532)

Petitioner should not be permitted to pick and choose its arguments before different courts and to "search" out

new basis for sustaining a search and conviction, especially when inconsistent with its position in the court below. To attempt to reverse the grant of habeas corpus by the Court of Appeals on an entirely different basis than argued in that court should not be permitted. The Respondent is placed in a horrendous position if Petitioner is permitted to flip-flop between legal positions in different courts. This is particularly true when, as here, the original conviction was sustained by a divided state supreme court and the District Court on habeas corpus found the line to be a "narrow one."

B. Fourth Amendment Principles Apply

In *Coolidge v. New Hampshire*, 403 U.S. 443, 461-462 (1971) Justice Stewart noted:

> "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."

Whether searches and seizures are valid is a question of federal constitutional law.[5] If evidence is secured as a result of a search and seizure that violates constitutional rights of the individual charged with a crime, it is inadmissible.[6]

If such evidence obtained by an illegal search is admitted into evidence and has a prejudicial effect on the defendant's case, then the Fourteenth Amendment due process clause requires that a subsequent conviction be

---

[5] *Kluck v. State*, 37 Wis. 2d 378, 386, 155 N.W.2d 26, 29 (1967).

[6] *Hoyer v. State*, 180 Wis. 407, 417, 193 N.W. 89, 93 (1923); *State v. Kroening*, 274 Wis. 266, 272-276, 79 N.W.2d 810, 814-816 (1954); *Mapp v. Ohio*, 367 U.S. 643 (1961).

reversed. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). *Kluck v. State*, 37 Wis.2d 378, 386, 155 N.W.2d 26, 29 (1967).

C. Officer Weiss' Conduct Constituted a Search of the Thunderbird

Officer Weiss' conduct at 2:13 a.m. on September 12, 1967, going to the Honeck's garage in Kewaskum, unlocking the car, and looking in the interior and then the locked trunk of the automobile constituted a search. (A. 90). This action was described by the prosecution during the course of the trial as a search. (A. 91, 92, 94). Officer Weiss testified that his reason for searching the car was that he was looking for the defendant's service revolver. (A. 91). It should also be noted that the County Court referred to Officer Weiss' conduct as a search in its decision on the pretrial motion to suppress (A. 57-58) and in its memorandum decision on motions after verdict. (A. 71-74).

Upon appeal to the Wisconsin Supreme Court and in the United States District Court, the state and Petitioner, Cady, sought to characterize the officer's action as an "inspection" rather than a search. With respect to the constitutional guarantees of the Fourth Amendment against unlawful search and seizure, there is no distinction in meaning between "search" and "inspect"; unlawful inspection is no less a violation than an unlawful search. 79 C.J.S., Searches and Seizures, §25, p. 795. States may not authorize police conduct which trenches upon Fourth Amendment rights, regardless of the label which it attaches to the conduct. *Sibron v. State of New York*, 392 U.S. 40, 61 (1968). In *Terry v. Ohio*, 392 U.S. 1, 16 (1968) the Court demolished as "nothing less than sheer torture of the English language" the myth that a "frisk" was not a "search". The focus of the Fourth Amendment

is on privacy, not on whether the conduct is described as an inspection or a search.

D. Fourth Amendment Requires Adherence to Judicial Processes

In *Chimel v. California*, 395 U.S. 752, 762 (1969), this Court said:

> "Only last Term in *Terry v. Ohio*, 392 U.S. 1, we emphasized that '[t]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,'*** and that 'the scope of [a] search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.' "

The burden is on those seeking an exemption from the search warrant requirement to show the need for it. *Chimel v. California*, 395 U.S. at p. 762 (1969); *United States v. Jeffers*, 342 U.S. 48, 51 (1951). Searches conducted outside the judicial process are, *per se*, unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967), (cited with approval in *Chimel v. California*, 395 U.S. at p. 763.) As a general rule, the Fourth Amendment requires as the requisite to the issuance of a search warrant the judgment of a neutral and detached magistrate on the probable cause issue. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

Officers conducting warrantless searches of an automobile must have "reasonable or probable cause" to believe that they will find the instrumentality of a crime or

evidence pertaining to a crime before they begin their warrantless search. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968).

E. Exceptions to Judicial Process

Recognized exceptions include the following:

(1) Search of an automobile when probable cause exists and it is not practical to secure a warrant because the vehicle can be quickly moved. *Carroll v. United States*, 267 U.S. 132, 153, 156 (1925). Although the Court made it clear that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used, . . ." *Id.*, p. 156.

(2) Search of an automobile seized by police for forfeiture under state law. *Cooper v. California*, 386 U.S. 58, 62 (1967).

(3) Discovery of evidence in plain view, not the result of a search, but of a measure taken to protect an automobile while it was in police custody. *Harris v. United States*, 390 U.S. 234, 236 (1968).

(4) Search incident to arrest of the area within arrestee's immediate control. *Chimel v. California*, 395 U.S. 752, 763 (1969).

and others not material to this case and these facts. Failure to comply with the search warrant requirement can only be excused by exigent circumstances. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970); *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

F. Recognized Exigent Circumstances Contrasted To Officer Weiss' Conduct

No exception is supported by this record. This is clearly a wholesale intrusion on the personal privacy and security of Dombrowski without probable cause authorized by a neutral and detached magistrate. See, *Davis v.*

Mississippi, 394 U.S. 721, 726 (1969); *Katz v. United States*, 389 U.S. 347, 356 (1967).

1. *Officer Weiss' Conduct Cannot Be Justified As A Search Incident to Arrest*

This case closely parallels *Preston v. United States*, 376 U.S. 364 (1964). In *Preston* the defendants were arrested by state officers on a vagrancy charge while sitting in a parked automobile and were convicted of conspiracy to rob a bank largely on evidence obtained by the state officers' search of the car after the defendants had been arrested, searched and taken to police headquarters, and the car had been removed to a garage.

Justice Black, speaking for the unanimous Court in *Preston*, stated that this Court's cases "make it clear that searches of motor cars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of such searches is admissible." 376 U.S. at p. 366. Justice Black noted that it was argued that the search was incident to an arrest and that such searches are justified by the need to seize weapons and other things which might be used to assault an officer, to effect an escape, as well as the need to prevent the destruction of evidence of the crime.

Justice Black stated, however :

> " . . . But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." 376 U.S. at p. 367.

The Court assumed that either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search this car when they first came on the scene. The Court continued:

"... But this does not decide the question of the reasonableness of a search at a later time and at another place. See *Stoner v. California*, post, p. 483. The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime—assuming that there are articles which can be the "fruits" or "implements" of the crime of vagrancy. Cf. *United States v. Jeffers*, 342 U.S. 48, 51-52 (1951). Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. See *Carroll v. United States, supra*, 267 U.S. at 153. We think that the search was too remote in time or place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible." 376 U.S. at p. 368.

In a recent case, factually similar to the instant case, the United States Court of Appeals for the Ninth Circuit, in *Barrentine v. United States*, 434 F.2d 636 (9th Cir. 1970), held that officers, who had arrested defendant on a drunk driving chage, had no probable cause to believe that evidence pertaining to such offense had been concealed in defendant's automobile or that the vehicle contained contraband, and thus, warrantless search of the car's trunk, which revealed sawed-off shotgun, was not reasonably incident to defendant's arrest and was illegal. The Court stated:

"The officers had no probable cause to believe that evidence of the offense for which appellant was arrested had been concealed in the automobile. There was no probable cause to believe that the vehicle contained contraband. The search of the trunk was not reasonably incident to appellant's arrest. The search was not of a vehicle subject to forfeiture proceedings. There were no exigent circumstances conceivable justifying the trunk search. Accordingly, the search was illegal. (*Chambers v. Maroney* (1970) 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419; *Dyke v. Taylor Implement Mfg. Co.* (1968) 391 U.S. 216, 88 S.Ct. 1472, 20 L.E. 2d 538; *Preston v. United States* (1964) 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed. 2d 777.)" 434 F.2d p. 637.

See also *United States v. Joyner*, 8 Cr. L. 2411, 2412 (E.D. Pa. 1971) holding unreasonable a second search of a car trunk without a warrant by an officer after the defendant had been arrested, taken into custody and the trunk of the vehicle initially searched with the consent of the driver.

In the instant case, like *Preston, Barrentine,* and *Joyner*, Dombrowski was arrested on a different charge, drunk driving, his automobile was serached at the accident scene, the car was locked and towed away to a private garage. Dombrowski was taken to the sheriff's office, police headquarters and then to a hospital under guard. While he was in the hospital, Officer Weiss traveled to a private garage in another city, to which the car had been towed, to conduct a second warrantless search of the Dombrowski car. This case is even stronger as Dombrowski was not only in custody but in the hospital under guard as a result of injuries he had sustained and the car, which had been locked and towed away, was damaged and inoperative.

The second search of the Dombrowski car was without warrant, consent or probable cause. The alleged justification for this warrantless search, "looking for Dombrowski's service revolver," establishes that the officer did not have "reasonable or probable cause" to believe that he would find the instrumentality of a crime or evidence pertaining to a crime. Accordingly, it is properly identified as overreaching governmental conduct, for which the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) was fashioned as a sanction to redress and deter because prohibited by the Fourth Amendment. *Davis v. Mississippi*, 394 U.S. 721, 726 (1969), [citing *Terry v. Ohio*, 392 U.S. 1, 19 (1968)]

There is no question that Dombrowski was under arrest and in custody when his vehicle was searched at Honeck's Garage. Therefore, the search was not necessary to protect the officers or to prevent the destruction of evidence since neither Dombrowski nor anyone associated with him had any control over the vehicle or its contents.[7] The car was in a damaged condition and unable to be driven. In addition, the state failed to sustain its burden of proof, under the fact circumstances of Dombrowski being in custody in a hospital in one city and the damaged and inoperative vehicle having been locked and towed away to another city, why speed was essential and why it was not reasonably practicable to apply to a magistrate for a search warrant if probable cause existed. *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

---

[7] See *United States v. Harvey*, 397 F.2d 526, 529 (7th Cir. 1968).

2. *Officer Weiss' Conduct Cannot Be Justified As a Search of a Vehicle in Police Custody*

Nor can the second search of the Dombrowski vehicle be justified either as the search of an automobile seized by police for forfeiture under state law or as the discovery of evidence, in plain view, not the result of a search, but of a measure taken to protect an automobile while it was in police custody.

The case is unlike *Cooper v. California,* 386 U.S. 58 (1967) which involved the search of an automobile seized pursuant to Section 11611 of the California Health & Safety Code which provides that any officer making an arrest for a narcotics violation shall seize and deliver to a designated state agency any vehicle used to store, conceal, transport, sell or facilitate the possession of narcotics and hold as evidence the vehicle until a forfeiture has been declared or a release ordered. In this case it must be conceded that no state law of Wisconsin authorizes the taking into custody by police an automobile belonging to a person involved in an automobile accident. This is likewise true of a car driven by a person arrested for drunken driving. The vehicle in this case was not impounded as evidence. Petitioner concealed in the United States Court of Appeals that Officer Weiss was not required by any regulation or statute to inspect or inventory the contents of Dombrowski's car. (Respondent's Br. in U.S.C. of A. p. 11).

The Wisconsin Legislature recently (but subsequent to the trial of the instant matter), saw fit to pass several new laws permitting the seizure of vehicles and retention by police when the vehicles have been used or employed in the unlawful sale of transportation of narcotics, danger-

ous drugs or gambling devices.[8] Previously (and specifically at time of the instant search) a vehicle was subject to seizure only in connection with certain cigarette tax matters.[9]

In the instant case there was no police regulation similar to *Harris*. In fact, the record clearly establishes that this vehicle was never considered by the Washington County Sheriff's office to be in their care, custody or control. It was not taken to the Sheriff's office in West Bend, but was towed by a wrecker to a private garage (Honeck's) in Kewaskum, another city. (A. 90) It was left outside of the garage. (A. 71) No one from the Sheriff's Department remained with the car. (A. 91) In addition, the car had been searched at the scene of the accident and then dutifully locked by Officer Boudry. (A. 110) Nothing Weiss did was done to protect the automobile or its contents and the record supports no other conclusion. It strains the imagination to believe that any alleged police "responsibility" for the car and its contents could require more than Officer Boudry's actions at the scene prior to the removal of the vehicle.

The police custody situation related in *Harris v. United States*, 390 U.S. 234 (1968) was approved on the thesis that the evidence was discovered not as a result of a search of the car, but on the basis of a measure taken to protect the car while in police custody. In *Harris* the petitioner's automobile had been seen leaving the site of a

---

[8] §151.18 Wis. Stats., effective December 7, 1969, Laws of Wis. 1969, Ch. 252; §161.29 Wis. Stats., effective December 7, 1969, Ch. 252 §6; §945.03(3), Wis. Stats., effective December 7, 1969, Laws of Wis. 1969, Ch. 252 §30; §161.45 Wis. Stats., effective February 20, 1970, Laws of Wis. 1969, Ca. 384 §22.

[9] §139.40, Wis. Stats. (1967).

robbery. It was traced to Harris and he was arrested as he entered it. After a cursory search of the car, the arresting officer took Harris to a police station. They decided to *impound the car as evidence,* and a crane was called to tow it to the precinct. The windows of the car were open and the door unlocked. A Metropolitan Police Regulation required an officer impounding a vehicle to search it, remove all valuables and to attach to the vehicle a property tag listing certain information. In *Harris* the arresting officer pursuant to the regulation proceeded to the precinct station lot where the car had been towed, to search the vehicle, place a property tag on it, roll up the windows and lock the doors. While securing one of the windows and doors,he observed a registration card on the door ledge which was later used in evidence. 390 U.S. at p. 235. Under what this Court characterized to be "these narrow circumstances" it held that the Fourth Amendment did not require the police to obtain a warrant. 390 U.S. at p. 236. In essence, the evidence fell in "plain view" of an officer who had a right to be in that position.

In the instant case the officers made no decision to impound the car as evidence. Nor was the officer authorized by any state law to do so. Cf. *Cooper v. California*, 386 U.S. 58 (1967). In Dombrowski's case the car was searched and secured at the accident scene and towed to a private garage. Some 2½ hours later Officer Weiss traveled from West Bend to Kewaskum to search for the defendant's service revolver in the locked car, not to take any measure to protect the automobile while it was in police custody—it in fact was not in police custody but at a private garage. In the Dombrowski case the officer was not tagging or securing the car. In fact he had to unlock it to search it. In the Dombrowski case the items seized were not in "plain view" while the car was being secured but in the locked trunk of the car.

3. *Officer Weiss' Warrantless Search of the Thunderbird Cannot Be Justified as a Reasonable Act To Secure Dombrowski's "Gun"*

The second search of the Thunderbird was unreasonable and not compelled by exigent circumstances. At the accident scene, Officers Boudry and Weiss knew that Dombrowski was a Chicago Police Officer. (A. 109) Although inquiring about other matters, they did not ask Dombrowski whether police regulations required him to have his gun with him when he was off duty and not in his jurisdiction, whether he had his gun with him and, if so, where it was located. Dombrowski was not incoherent at this time. (A. 103). Instead, Officer Boudry chose to search through the inside of the car, including under the seat, in the glove compartment and in the back seat. (A. 110). No weapon was found. Boudry then locked the car. (A. 110). The car was then towed to a private garage in Kewaskum. (A. 90). No gun was ever found in the vehicle. Assuming, however, that there initially had been reason to believe that a gun was in the car, certainly the locked doors and locked trunk were reasonable protection against the possibility that unknown persons in the middle of the night in a rural area of Wisconsin would gain access to the locked vehicle and locate the gun which Officer Boudry's search failed to locate. At no time following the search did the officers make any inquiry of Dombrowski about the "gun" although they testified that Dombrowski continuously advised them that he was a police officer. (A. 83). Nor does the record show that the officers made any inquiry concerning whether Dombrowski had a gun with him when they talked to Dombrowski's wife by telephone. (A. 85, 106).

Petitioner now seeks to imply that Dombrowski may have had a gun and was incapable of communicating to the officers whether he had a gun with him, where it was located and that the officers should keep it in a safe place. (Petitioner's Br. p. 27). The record clearly fails to support such inferences. No officer asked Dombrowski whether he was required to carry a gun, if he had one, or where it was located. The accident occurred at about 10:30 p.m. Dombrowski called the Washington County Sheriff's office and reported the accident to them and met with the officers at the Glacier Inn in Kewaskum. (A. 107-109). Dombrowski told the officers his occupation. (A. 109). In answer to Officer Boudry's question, Dombrowski advised him that there were no others involved in the accident and that he was alone. (A. 109). He furnished his license and identification. (A. 81). Although at the accident scene Dombrowski gave the officers three different accounts of how the accident had occurred, (A. 109) those inconsistent statements did not demonstrate that he was incapable of advising him, if asked, whether he was required to have a gun with him, if he had such a gun, and if so where it was located. Officer Weiss specifically testified that Dombrowski was not incoherent at this time. (A. 103). Dombrowski was able to answer the inquiries of Assistant District Attorney Aldwin Seefeldt at the Sheriff's office in West Bend prior to his arrest. (A. 81-82). Subsequently, at the West Bend Police Department, Dombrowski was capable enough to refuse to take a "chem" test. (A. 82-83). It was while Dombrowski was at the West Bend Police Station that the officer first observed him to be incoherent at times. (A. 83). It was at the hospital at 2:00 a.m., about 2½ hours after the officers and Dombrowski had left the

accident scene, that Dombrowski was uncommunicative. (A. 105).

It is significant to note that the officers were looking only for Dombrowski's service revolver and made no pretext of concern for safeguarding other valuables or personal property of Dombrowski.[10]

Cabbler v. Virginia, 212 Va. 520, 184 S.E.2d 781 (Va., 1971) relied upon by petitioner (Petitioner's Br. p. 25) is facutally inapposite to what occurred in this case. In *Cabbler*, the officer advised the defendant that his car would be removed to the city garage for safekeeping until his release from custody. The car, before being stored in the city garage, was taken to the police property room where the contents of the car were to be removed, inventoried and stored for safekeeping. It was then that the police discovered the stolen goods that result in Cabbler's later convictions. In the instant matter, no effort was made to safeguard or take Dombrowski's car into police custody for purposes of safekeeping. It was removed from the accident scene to a private garage in Kewaskum, Wisconsin where it remained parked on a lot outside of the garage. No effort was made to guard or safekeep the vehicle nor did the officers intend to take

[10]It is not without doubt that the search for Dombrowski's service revolver was one of innocent purpose rather than a search for incriminatory evidence. For example, it is a criminal offense in the state of Wisconsin to go armed with a concealed and dangerous weapon although an exception is made for peace officers. §941.23 Wis. Stats. (1967). See definition of "peace officer". §§939.22(22), 964.245 Wis. Stats. (1967). The driver of an automobile goes armed within the meaning of the law when he has a dangerous weapon within reach. *Mularkey v. State*, 201 Wis. 429, 432, 230 N.W. 76 (1930).

any further steps to safeguard Dombrowski's personal property. Other than searching for the service revolver, there is nothing to indicate in this record that the police officers intended to remove Dombrowski's personal property, inventory it and store it until his release.

It is important to bear in mind that Dombrowski's Thunderbird automobile was not in police custody in any respect. What took place here was a general exploratory search of an automobile in which Dombrowski had a reasonable expectation of privacy and personal security.[11]

II.

THE DISCOVERY OF A WHITE SOCK AND FLOORMAT BY A STATE CRIME LABORATORY REPRESENTATIVE IN A THIRD SEARCH OF THE DODGE OCCURRING SUBSEQUENT TO THE EXECUTION OF THE SEARCH WARRANT FOR THE DODGE WAS NOT INADVERTENT AND NOR REASONABLE WITHIN THE PLAIN VIEW DOCTRINE

On September 12, 1967, law enforcement authorities conducted an extensive search of Dombrowski's brother's farm, including Dombrowski's 1960 Dodge which was located thereon. (A. 167-177). Undersheriff Howard went up to the Dodge automobile and "looked into" or visually searched it.[12] (A. 167-168). At 8:02 that evening

---

[11] Several recent cases have condemned general exploratory searches allegedly done to inventory or inspect property. See *Mayfield v. United States*, 9 Cr. L. 2115 (D.C. Cir. 1971); *United States v. Mossbauer*, 9 Cr. L. 2276-2277 (U.S. Ct. Mil. App. 1971).

[12] The Court of Appeals held that the police were lawfully on the farm and the plain view doctrine justified the seizure of the items that were observed by Howard in the Dodge. (Pet. App. 109-110).

Raymond Howard, Undersheriff, applied for a search warrant for the 1960 Dodge. (A. 40). The search warrant was issued by the County Court of Fond du Lac County, Wisconsin, at 8:15 p.m. on September 12, 1967. (A. 31).[13]

The search warrant for the 1960 Dodge was executed by Undersheriff Howard that evening right after he left the courtroom. (A. 172). The same night that he made the search, he removed the 1960 Dodge from the farm premises. (A. 172). On the next day, September 13, 1967, Undersheriff Howard prepared his return to the search warrant listing the items that he found in the search of the 1960 Dodge. (A. 172-173). The thoroughness of the search appears from the return. The return listed not only the items discovered in the search of the Dodge, but other items that were found outside of the car on the premises. (A. 33, 173). Neither the white sock nor floormat were listed in the return. The return itself does not indicate that it was a "partial" return as

---

[13]The Court of Appeals expressly refrained from deciding whether the search warrant for the 1960 Dodge was valid (Pet. App. 110). Dombrowski had challenged by pretrial motion the admissibility of the items seized pursuant to search warrant for the 1960 Dodge. Basically, Dombrowski asserted (1) that the search warrant was void on its face since it failed to particularly describe the place to be searched and the person and things to be seized in violation of the Fourth and Fourteenth Amendments, United States Constitution. [See *Stanford v. State of Texas*, 379 U.S. 476, 485 (1965)], (2) that probable cause had not been established [See *Aguilar v. Texas*, 378 U.S. 108, 114 (1964)] and (3) that the attorney's statement to the police and the testimony of Officer Howard in obtaining the search warrant were the fruit of the unlawful search of the Ford Thunderbird. [See *Wong Sun v. United States*, 371 U.S. 471 (1963); *Alderman v. United States*, 394 U.S. 165, 177 (1969)].

indicated in Petitioner's brief. (A. 33, See Petitioner's Br. p. 6).

Undersheriff Howard described his observations made while conducting the visual search of the car and later when searching pursuant to the search warrant. In the visual search, he said he observed a pillow case covering what appeared to be blood. He could see blood where it ran off of the cushion and was beyond the coverage range of the pillow case. He could see blood on a brief case on the floor and blood splattered on the back of the front seat and on the side of the back seat of the car. (A. 143). In executing the search warrant, the items he found were the items listed in his return. (A. 173). Of the items listed in his return, a necktie, books of matches partially burned and a fresh pile of straw were in fact located outside of the car. (A. 173). There is no evidence in the record which supports the proposition that either the white sock or floormat (Trial Ex. 32 and 37) were ever seen by Undersheriff Howard.

The white sock and floormat (Trial Ex. 32 and 37) were not simply "taken up and labeled" by Mr. Mauer of the State Crime Laboratory. He searched the vehicle. (A. 160). He searched the vehicle the day after the search warrant had been executed by Undersheriff Howard. (A. 158). He searched the 1960 Dodge while it was located at the Fond du Lac County Sheriff's Garage. (A. 158). Mr. Mauer, the State Crime Laboratory representative, did not make recoveries from the car while it was located in the farm area. (A. 155). No further warrant for the search of the car had been obtained, but the State Crime Laboratory representative stated that he was acting in the capacity of the Sheriff's Department of Fond du Lac County. (A. 155-156). The items that were recovered by Mr. Mauer were not listed and attached to

the search warrant as a return. (A. 156). These items seized in the third search of the 1960 Dodge were introduced in evidence at Dombrowski's trial. (A. 153-154).

At the time of Mauer's search, the warrant had already been executed and a return prepared. It cannot thereafter serve as a basis for unlimited additional searches. 79 C.J.S. Searches and Seizures, §83, p. 897.

As the Court of Appeals correctly pointed out, there was no continuing authority under the warrant issued the previous night. First, the white sock and floormat were not described in the warrant and were not observed the night before. Second, when the warrant was returned–before Mauer came on the scene–it was *functus officio.* (Pet. App. 111). Mr. Mauer did not have prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating Dombrowski. It is clear that his discovery was not "inadvertent". He was searching for further evidence concerning the homicide. Accordingly, the plain view doctrine does not justify his warrantless search and seizures. *Coolidge v. New Hampshire*, 403 U.S. 443, 467-468 (1971).

III.

THIS COURT SHOULD NOT MODIFY WISCONSIN'S EXCLUSIONARY RULE ADOPTED PRIOR TO THE *MAPP* DECISION

A. Issue Should Not Be Considered

Petitioner in his statement of the questions presented poses the question, "4. Does the 'exclusionary rule' serve society's needs?" and indicates that question was not considered by the Court of Appeals (Petitioner's Br. p.

3). Perhaps it should also be added that this issue was never briefed in the Court of Appeals. Nor was this issue presented by the Petitioner to the District Court, Wisconsin Supreme Court or County Court of Fond du Lac County, Wisconsin. It should not be considered by this Court. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397-398 (1971).

B. Wisconsin Exclusionary Rule

Assuming *arguendo* that a modification of the exclusionary rule is considered by this Court, notwithstanding it not being considered by the courts below, on the merits the exclusionary rule should not be modified. When the Petitioner in this case asks this Court to modify the exclusionary rule enunciated in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Petitioner is in reality asking this Court to modify Wisconsin's own exclusionary rule applicable to state criminal cases which was adopted by the Wisconsin Supreme Court prior to the *Mapp* decision.

Wisconsin case law holds that whether a search and seizure are valid is a question of federal constitutional law. *Kluck v. State*, 37 Wis. 2d 378, 386, 155 N.W.2d 26, 29 (1967). If evidence obtained by an illegal search is admitted into evidence and has a prejudicial effect on the defendant's case, then the Fourteenth Amendment due process clause requires that a subsequent conviction be reversed. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Browne v. State*, 24 Wis. 2d 491, 129 N.W. 2d 175, 131 N.W.2d 169 (1964); *Kluck v. State*, 37 Wis. 2d 378, 386, 155 N.W.2d 26, 29 (1967).

The State of Wisconsin adopted the exclusionary rule prior to the *Mapp* decision and has held inadmissible in Wisconsin Courts evidence obtained by illegal search and seizure. *Hoyer v. State*, 180 Wis. 407, 417, 193 N.W. 89,

93 (1923); *Jokosh v. State*, 181 Wis. 160, 163, 193 N.W. 976, 977 (1923); *State v. Kroening*, 274 Wis. 266, 272-276, 79 N.W.2d 810, 814-816 (1954). In *Kluck v. State*, 37 Wis. 2d 378, 386, 155 N.W.2d 26, 29 (1967) Justice Hanley of the Wisconsin Supreme Court stated the purpose of the Wisconsin exclusionary rule as follows:

> "* * * The purpose of exclusion of evidence in violation of the strictures placed upon searches and seizures has for its purpose the protection of privacy. * * *"

This Court has recognized that the role of the Fourth Amendment is to protect against invasions of privacy and to protect the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. It protects him from unwarranted governmental intrusion. *Warden v. Hayden*, 387 U.S. 294, 305 (1967); *Hoffa v. United States*, 385 U.S. 293, 301 (1966).

Ker v. California, 374 U.S. 23, 34 (1963) authorized "workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States". The opinion of the Court stated:

> "Preliminary to our examination of the search and seizure involved here, it might be helpful for us to indicate what was not decided in *Mapp [v. Ohio*, 367 U.S. 643]. First it must be recognized that the 'principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . this Court has . . . formulated rules of evidence to be

applied in federal criminal prosecutions' . . . *Mapp*, however, established no assumption by this Court of supervisory authority over state courts, . . . and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law. *Mapp* sounded no death knell for our federalism; rather, it echoed the sentiment of *Elkins v. United States, supra*, at 221, that 'a healthy federalism depends upon the avoidance of needless conflict between the state and federal courts' by itself urging that '[f]ederal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect *the same fundamental criteria in their approaches*.' 367 U.S., at 658." (Emphasis in *Ker*.) *Id.* at p. 31.

This Court should avoid modifying Wisconsin's exclusionary rule prohibiting the introduction of evidence obtained as a result of an illegal search and seizure.

C. Exclusionary Rule Should Not Be Modified at This Time

The popular rhetoric of Petitioner suggesting the effect of the exclusionary rule to be that a murderer will be a free man[14] must, of course, be balanced against the state's announced intention of retrying Dombrowski if Petitioner does not succeed in this matter. (R. Letter dated 9/1/72 from Mary V. Bowman, Attorney for Cady, to Hon. Myron L. Gordon). Criticisms for this type seek to shift popular blame to the courts from those who were responsible for the unconstitutional conduct.

Legal arguments advanced by Petitioner for modification of the exclusionary rule are primarily drawn from

[14] See Petitioner's Br. p. 40.

two sources. They are: (1) Professor Oaks' law review article, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Ch. L. Rev. 665 (1970) and (2) Chief Justice Burger's dissent in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

It is claimed that the exclusionary rule has not worked. There is no empirical data to conclusively establish this. Such proof is not found in Professor Oaks' article. His article states that the evidence is not conclusive, although, in pages 678-709 and especially the summary of findings on pages 706-709, it sets forth a good deal of statistical data challenging the effectiveness of the exclusionary rule. For example, he cites a study of arrests and convictions for seizures of property in Cincinnati, Ohio before and after the *Mapp* decision as showing no significant changes in police behavior. In commenting on this analysis the American Bar Association, Section on Criminal Law, Majority Report, to the House of Delegates, 107c, [concerning the exclusionary rule and Senate Bill No. 2657 (92d Congress, 1st Session, as amended)] states:

> "* * * The majority position of the Council is that in actuality there is no way to be certain what precise effect the exclusionary rule has had on police conduct without an extensive examination of at least a representative sample of police actions in connection with particular searches, seizures and arrests. This is so because no notoriety attends *legal* police conduct, and both incidents and the motivation for it go unrecorded. It is probable that very marked, but unmeasured, improvements in police procedures have taken place. For example, there has not come to the attention of the courts since the *Mapp* decision any cases revealing such outlandish police practices as took place in California in the

Irvine and *Cahan* cases, with the exception, perhaps, of the revelation of illegal federal wiretapping practices in the 1960's.

"Indeed, if it is assumed that police intend to be both rational and lawful, and any other assumption is insupportable, then the exclusionary rule must have contributed to more lawful actions by the police, augmented the professionalism of law enforcement officers, and improved the integrity of the judicial process by leeching from it at least some illegally acquired evidence. Furthermore, the overwhelming percentage of pleas and convictions which attend charges provides ample proof that the rule has not stultified either police work or the judicial process. At the same time there is no demonstrated connection between increases in crime rates and the rule. To conclude otherwise requires generalizations about cause and effect in crime rates which are unwarranted without vastly more data and analysis than is now available. For there (sic) reasons, it is our considered view that the exclusionary rule, while no panacea, is, of all the available alternatives, most likely to motivate police conduct in a lawful direction." *Ibid* at p. 9-10.

On February 12, 1973, the American Bar Association's House of Delegates, the policy making body of the nation's lawyers, voted 129 to 114 in support of the Majority Report of the Criminal Law Section, which opposed Senate Bill No. 2657 and also affirmed the American Bar Association's support of the exclusionary rule in State and Federal criminal proceedings.

Proposed modification of the exclusionary rule set forth in Senate Bill No. 2657 differs in only two respects from the American Law Institute's Model Code of Pre-Arraignment Procedure, Proposed Official Draft No. 1, April 10, 1972, which Petitioner urges the court to

adopt. It should be noted that the Minority Report to the American Bar Association House of Delegates, at p. 11, points out that an important element of the proposed bill, not found in the American Law Institute draft, is the right to sue the Federal Government for tort damages for illegal searches and seizures conducted in violation of the Constitution by Federal employees.

Chief Justice Burger in his dissent, in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), suggests that an entirely different remedy should be developed by legislative action, *Id.* at p. 422. After suggesting the framework of such a remedy he notes that once the constitutional validity of such a statute is established, it can reasonably be assumed that the states would develop their own remedial systems on the federal model. *Id.* at pp. 422-424. Specifically, Chief Justice Burger warned:

> "Any such legislation should emphasize the interdependence between the waiver of sovereign immunity and the elimination of the judically created exclusionary rule so that if the legislative determination to repudiate the exclusionary rule falls, the entire statutory scheme would fall." *Id.* at p. 423 n. 7.

Chief Justice Burger did not proposed that the Court abandon the suppression doctrine until some meaningful alternative can be developed. *Id.* at p. 420. He counseled:

> "* * * To overrule *Weeks* and *Mapp*, even assuming the Court was not prepared to take that step, could raise yet new problems. Obviously, the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared. I am

concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases. For years we have relied upon it as the exclusive remedy for unlawful official conduct; in a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be."*Id.* at p. 420-421.

Assuming *arguendo* that a modification of the exclusionary rule should occur, such a change should be left to Congress and the state legislatures, which are better equipped to obtain empirical and other data concerning such changes and fashion remedies consistent with national and state experiences. In no event should any modification be made to retroactively apply to the search in this case that occurred over five years ago when the exclusionary rule clearly applied. If there is to be change prospectively, the alternative to be selected for Wisconsin, (which has sought to provide training to its law enforcement personnel through bulletins issued by the state Attorney General's office, as well as vocational and college level training programs), might vary widely from that of another state which lacks such experience.

At this time the Court should not seek, in effect, to modify Wisconsin's exclusionary rule.

CONCLUSION

The decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

WILLIAM J. MULLIGAN
108 West Wells Street
Milwaukee, Wisconsin 53203
DAVID E. LEICHTFUSS
324 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Attorneys for Respondent

February, 1973